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San Jose Police Officers' Association

8 INTEREST ARBITRATION

9 BEFORE JOHN A. FLAHERTY (RET.) – JAMS

10 In The Matter of Interest Arbitration
11 Between

12 CITY OF SAN JOSE,

13 Employer,

14 and

15 SAN JOSE POLICE OFFICERS'
16 ASSOCIATION,

17 Association.

**SAN JOSE POLICE OFFICERS'
ASSOCIATION'S INTEREST ARBITRATION
BRIEF**

Date(s): May 6, 7, & 8, 2013
Time: 9:00 a.m.
Location: San Jose City Hall
200 W. Santa Clara St.
Room 118-120
San Jose, CA

Arbitrator: Hon. John A. Flaherty (ret.)

I

INTRODUCTION AND FACTUAL SUMMARY

San Jose Police Officers' Association's ("POA" or "the Union") Last, Best and Final Offer ("LBFO") is premised upon 8 overriding principles:

1. Public safety is the No.1 priority of any government;
2. The City of San Jose (the "City" or "San Jose")—formerly America's safest big city—has seen a significant increase in crime;
3. The San Jose Police Department ("SJPd")—formerly a "magnet" police agency—is collapsing through unprecedented levels of officer resignations;
4. The 10% concession, the pending threat of implementation of Measure V, San Jose's lack of competitiveness in the police market, and the perception that City Hall disdains the police officers who keep its citizens safe, have caused hundreds of officers to leave;
5. The reality that many dozens of current officers will leave if there is no restoration of the 10% concession;
6. The restoration of the 10% concession and the relative stability of a two-year contract will persuade many officers who would otherwise leave San Jose to stay longer.
7. Whereas the City's budget *could* undoubtedly support *immediate* sunset of the 10% concession, a more gradual sunset, while City finances improve, is the most responsible action.
8. The City's wage and term proposal—really all of the City's offers—give San Jose police officers NOTHING and will only worsen the public safety crisis that overshadowed the proceedings.

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The testimony established that while San Jose's financial condition is far from ideal, it is recovering markedly and the *actual* ability to pay the POA's proposal undoubtedly exists. If the evidence at the hearing left any doubt, **the latest revisions to the 2013-14 City budget show an upward projection of \$10.85 million in property tax revenues.** (See Jt. Exh. 33, J. Maguire Additional Funding and Revenue Memo to Council.)

What does not exist—yet—is the political will in current City leadership to sufficiently prioritize police officer pay so that it takes precedence over other laudable City budget goals. The POA believes this is reflective of other issues, not what is in the best interests of the citizens of San Jose. The City Manager acknowledges the City’s inability to retain officers—yet the City rejects the sunset of the 10% concession categorically.

Ultimately, however, it is not the City that decides this issue. San Jose voters have seen fit, through Charter Section 1111, to give this Arbitration Panel (“Panel”)—not the Mayor, the City Manager, or the City Council—ultimate authority to decide issues such as those presented within the Charter parameters.

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The primary question before the Panel is whether the 10% total compensation concession, originally agreed to in June 2011, and continued for a second year in December 2011, should sunset. The POA's LBFO concludes that it must, and provides a balanced approach as to how the City can responsibly balance its recovering financial state with its public safety needs while restoring police officer salaries by July 2014.

The City rejects the need to return police officers' wages to the level they were in 2009. It takes the fictional position that the POA agreed to an ongoing 10% concession. The evidence (discussed in greater detail below) refutes that argument. Uniquely among city bargaining units, the POA preserved the right to arbitrate whether a sunset of the concession is justified before the next Memorandum of Agreement ("MOA") takes effect. That question is squarely before the Panel.

If the sunset is determined in the POA's favor, the restrictions in section 1111 with respect to new salary increases are not implicated, because **the sunset occurs as a restoration under the current MOA**, and the **POA seeks no wage increase under the new MOA** to be determined by the Panel.

The POA has received no response to its May 20, 2013 on-the-record proposal (a copy of which was provided to the Panel) notwithstanding the City's suggestion that

1 negotiations would continue and the matter conceivably be resolved before the Panel
2 deliberates. (See City LBFO cover letter p. 2.)

3 II

4 FACTORS TO BE CONSIDERED BY THE PANEL

- 5 1. **§ 1111(e)—Panel to select whichever offer is “in the best interest and promotes the welfare of the public”:** In this proceeding there are two
6 competing public welfare concerns: police officer retention and the
7 recovering City budget. One is getting dramatically better (*see* testimony
8 discussed below from Figone, Guerra, Reilly and Fairlie); one is getting
9 significantly worse (*see* testimony discussed below from Figone, Woolsey
10 and Robb). The POA’s LBFO and its arguments and analyses address these
11 two key issues throughout.
- 12 2. **§ 1111(e)—“factors traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of public and private employment, including but not limited to, changes in the average consumer price index for goods and services, the wages, hours, and other terms and conditions of employment of other employees performing similar services”:** The POA addresses each of these issues:
13 comparability with other police officers (Koch and Bickert testimony); with
14 the private sector (Fairlie); with the consumer price index (Fairlie, Woolsey).
- 15 3. **§ 1111(f)—the City’s financial condition and ability to pay for compensation from ongoing revenues without reducing City services:**
16 The POA addresses these primary factors through analysis of the testimony
17 of Figone, Guerra, Reilly and Fairlie.
- 18 4. **§ 1111(f)—increases or decreases for other bargaining units:** This criteria
19 is difficult to apply. No other unit has received any increases or decreases.
20 Ms. Schembri acknowledged the City’s current proposal to them; however,
21 equally she acknowledged the City’s obligation to bargain in good faith to
22 agreement or impasse. And the City, ultimately, can impose terms on the
23 other units, excepting the firefighters.
- 24 5. **§ 1111(g)—“Rate of Increases in Revenues”:** The POA has not contested
25 City Exhibit 3 and Ms. McCahan’s calculations. But the central issue
26 between the parties as far as the wage proposals are concerned is whether or
27 not the parties intended for the application of section 1111(g) to preclude—
28 according to the City, as a matter of law—the sunset of the 10% concession.
As explained below, the December 7, 2011 Agreement preserved the
arbitrability of the sunset question **under the current MOA** separate and
apart from possible increases in a new MOA.

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III

WITNESSES

1. Debra Figone Testimony

The City Manager was quite candid in acknowledging:

- The POA and City have historically enjoyed better Labor Relations, including the POA being the first labor organization to begin significantly to *prefund* retiree healthcare. (Transcript of Proceedings (“TP”) p. 252.) **Police officers and their families gave up about \$46 million in salary in 2011-2013 to help the City through the economic downturn.** (TP 260-261.)
- **Police officers are resigning en masse, often to smaller local jurisdictions, because it is “too expensive for them to work in the city.”** (TP 246.) Whereas the City employed approximately 1400 sworn officers when Ms. Figone became City Manager, now the number is below 1100. (TP 249.)
- **Each time** one of the 150 officers resigned in the past two years, the city incurred **approximately \$170,000 worth—** cumulatively \$25,000,000+—**of hiring and training costs exited with them.** (TP 248-249.)
- The Charter—through Measure B (pension)—requires 4% extra retirement contributions effective June 2013, but the City voluntarily stipulated to put that off until January 1, 2014. (TP 250-251.)
- The City: wants to retain a competitive workforce; has historically had the “best and brightest” police officers; and has been a magnet city. (TP 255-256.)¹ However, the City has made no proposal over the last two years to try to retain officers. (TP 249.)
- Ms. Figone had a three-prong Fiscal Reform Plan in 2011: it sought a 10% concession from employees—she got that; it sought pension reform—she got that too; and it sought increased revenue. But **despite her recommendation in August of 2012 that the City Council seek a half cent sales tax increase, the Council declined.** That increase, had it passed (and an equivalent one passed overwhelmingly on the county level), would have brought approximately \$60 million in increased revenue into the City annually. (TP 263-265.)
- **City budgeting is a “question of balancing priorities ... based on what the residents expect of their government.”** (TP 258-259.) And whereas the City Manager offered two

¹ See also Proposed Budget pp. 3, 6-7. (Jt. Exh. 6.)

1 deliberately unpalatable budget scenarios in her presentation
2 to meet the cost of the immediate end of the POA
3 concession, there are hundreds, possibly thousands of
4 alternative budget scenarios to find available funds. (TP
5 272.)

6 **2. Joseph Guerra Testimony**

7 Mr. Guerra spent 8 years as Budget and Policy Director for former Mayor
8 Gonzalez. (TP 796-797.) His key testimony tracked a written report (POA Exh. 24) he
9 presented to the Panel:

- 10 • The budget process in San Jose—like any other public
11 entity—is one of competing political viewpoints applied to a
12 legislative process. (TP 800-802.) The bamboo courtyard
13 renovation is one example: yes, root intrusion, but the
14 \$250,000 expenditure also includes a new shade structure,
15 for improved ambiance—at a time when the City claims not
16 to be able to afford to adequately pay to retain its police
17 officers. (POA Exh. 24, p. 3.) **Point: The money exists, if
18 not the political prioritization of the restoration of police
19 officer salaries.** As Guerra explained:

20 So if somebody came to me to said, "Joe, do we have
21 the money to do 'X,'" whatever that "X" is, I'd be able
22 to answer that question and tell them, "Yes, you have
23 that money," or "**To get that money, here's the
24 decisions you'd have to make -- the priority
25 decisions you'd have to make about what you
26 wanted to do being more or less important than
27 something that's in the proposed budget from the
28 City Manager.**" (TP 804.)

- 29 • **There is a preponderance of evidence, largely drawn
30 from the City Manager's Proposed Budget, that there are
31 resources available to the City to address the police
32 compensation issues.** (POA Exh. 24, p. 4.) This includes
33 estimates of \$102 million of unspent money at the end of
34 2012-13 fiscal year. (*Id.* at p. 6; TP 806-807.) Thus, had the
35 City restored the 10% on July 1, 2012, it *could have* done so
36 within the prior year's budget parameters—the unspent
37 figure would be \$80 million, instead of \$100 million.
- 38 • **The City is in healthy enough financial condition to set
39 aside \$13.7 million for a Budget Stabilization Reserve** that
40 may—or may not—be necessary to address budget shortfalls
41 in FY 2014-15 (i.e., that might be needed in June 2015) (*Id.*):
42 an arguably unnecessary degree of budget conservatism
43 given the public safety crisis. Other contingency reserves
44 would stash away an additional \$32.6 million. (*Id.* at 7.)
45 The City is fighting the county over Redevelopment Agency
46 fees, incurring significant legal costs in a fight it surely

believes it can win; yet it is putting aside sufficient funds to cover the consequences if it should lose. (TP 814-815.)

- **The City is pre-paying down debt service payments voluntarily**—a laudable goal, no doubt, but one more important than *trying* to retain police officers? Guerra doubted it, and gave the 15-year mortgage versus sending a child to Stanford hypothetical.
- **Services funded on a one-time basis in 2012-13 are being “continued”**—meaning that the City has prioritized these elements, which did not warrant ongoing funding last year, above the sunset of the POA concession. (TP 812-813; POA Exh. 24 at 10.) The General Fund has \$1.1 billion in ongoing monies; public safety is purportedly the Mayor’s No. 1 goal. (*Id.* at 24)²
- Whereas the City projects a \$2.6 million deficit at the end of 2013-14, **the budget finds room for \$45 million in infrastructure spending, service level enhancements and reserves.**
- Notwithstanding Guerra’s general support for conservatism in projecting revenue, **the City’s revenue projections are unnecessarily conservative**—see, e.g., Proposed Budget’s 1.1% projected sales tax increase in 2012-13 (this year) compare with Fairlie and Reilly testimony on property tax rates and 2.2% increase in 2011-12. (*Id.* at 16.)
- There are multiple common sense options for how the City could finance the sunset without reducing current service levels—Guerra explained where \$20 million could be found, but the POA LBFO wage proposal would only cost approximately \$8 million. (POA Exh. 24, p. 30; TP 832-833.) As Jennifer Maguire acknowledged in her testimony:

Adam: If the City Manager came to you and said, "I've got a really big problem, and **I need you to find \$5 million in the City budget to help me pay for that problem,**" you would probably identify some consequences of finding that \$5 million, but ultimately you would do as directed and find the \$5 million; right?

Maguire: Yeah. It's a net zero sum gain. So you could move money around, and we can make recommendations about that, but there would be consequences to that once you have a

² Guerra points out that whereas Charter section 1111 prohibits the Panel from issuing a ruling that requires the reduction of City services, the Proposed Budget is already increasing services over the prior fiscal year. (POA Exh. 24, p. 22; TP 827-29.)

1 balanced budget unless some other factors
2 came into play.

3 Adam But "Yes" or "No"? If you needed to find that
4 -- if you were directed to find that money,
5 **you could find the money in the budget?**

6 Maguire **Yes, I could.** (TP 900 [emphasis added].)

- 7 • In response to Ms. Maguire's criticism of Mr. Guerra on
8 account of an alleged double standard in that it was okay to
9 set up a budget stabilization reserve in his day, but not now,
10 Guerra responded:

11 Guerra: I think it's a very fair question, and it is
12 accurate. The term "Economic Uncertainty
13 Reserve" was one that I created in one of the
14 Mayor's June Budget Messages. We did set
15 aside money. She characterized it accurately.
16 We saw the dot com bust coming. We knew
17 that eventually that was going to hit the City's
18 budget. So we set aside some money to deal
19 with that.

20 The difference between then and now, from
21 my perspective, **the very simple answer is**
22 **back then when we created the Economic**
23 **Uncertainty Reserve to set money aside, we**
24 **were the safest big city in America. So**
25 **being prudent on the fiscal side when**
26 **you're able to be the safest big city in**
27 **America and achieve that level of**
28 **performance in your top priority for the**
service delivery didn't stop us from
achieving that goal from a public safety
standpoint for our residents. (TP 914.)

29 3. Tim Reilly Testimony

30 Tim Reilly is a Certified Public Accountant who has extensive experience in
31 analyzing the financial wealth of public entities. (POA Exhs. 1 and 2.) He drew the
32 following conclusions from reviewing the City's Comprehensive Annual Financial
33 Reports ("CAFR") and related documents:

- 34 • **A budget is a spending plan**; it does not reveal the financial
35 health of the City, nor its resources, nor what actually
36 happens. (TP 74-75.)
- 37 • **The City of San Jose's budget projections typically**
38 **underestimate revenues and overestimate expenditures.**
(TP 75.) For example, from 2007 through 2012 the City

1 always projected large deficits but always realized
2 substantially or dramatically better deficits—in 2012, the
3 City projected a budget deficit of more than \$60 million but
4 realized a surplus of more than \$14 million. (POA Exh. 3
(Exh III-A “Surpluses, Amendments and Variances,”
particularly compare red columns to green columns) and
Reilly testimony at TP 103-111.)

- 5 • After declining between 2007 and 2011, **the amount of tax**
6 **resources invested in capital assets increased**
7 **dramatically in 2012** to exceed 2007 levels. (POA Exh. 3
(Exh I “Net Assets”) and Reilly testimony at TP 82-83.)
- 8 • Government revenues were still declining, though less
9 precipitously, through Fiscal Year 2012. (POA Exh. 3 (Exh
10 II-A, “Governmental Revenues”) and Reilly testimony at TP
11 84-88.) This includes property tax revenues, although that
12 issue is somewhat tied up in litigation over the former
13 Redevelopment Agency. (*Id.* at (Exh. II-B “Tax Revenue
14 Analysis”) and TP 90-93.)
- 15 • Total assessed property values increased, albeit modestly, in
16 2013 for the first time since 2009. (*Id.* (Exh. II-C “Tax
17 Revenue Analysis”) and TP 95-99.) But **the median market**
18 **value for residential properties is increasing**
19 **dramatically, including by 18.27% between November**
20 **2011 and November 2012, and in those upwardly assessed**
21 **values have yet to be collected as property taxes.** (*Id.*
(Exh. II-D “Median Market Value”) and TP 99-101.)
- 22 • **Quarterly sales tax receipts have rebounded strongly and**
23 **now exceed pre-recession levels.** (*Id.* (Exh. II-[sic]D
24 “Quarterly Sales Tax Receipts”) and TP 104-106.)
- 25 • The City has unrestricted fund balances of approximately
26 25% of total revenues—in non-CPA parlance, **San Jose has**
27 **about five times as much unrestricted funds available to**
28 **it to spend on any purpose the City chooses, including**
personnel costs, when measured against the historical
“healthy” benchmark of 5%. (*Id.* (Exh. V-A “Unrestricted
Fund Balance”) and TP 114-121.)

22 4. **John Robb Testimony**

23 Robb is a Sgt. and POA Vice-President. His testimony highlighted:

- 24 • The **unprecedented spike in resignations:** from typically
25 single figures to 64 and 69 in 2011 and 2012. (TP 722-726,
26 POA Exh. 21.) And the expectation that other officers will
27 leave, particularly if there is no restoration of the 10%
28 concession or if Measure B is implemented. (TP 716-718,
POA Exh. 17.)
- Officers are **mostly going to other Bay Area jurisdictions.**
(TP 722-726, POA Exhs. 18-20.)

- **SJPD can no longer attract lateral police officers** (and that was before the new, worst in the State, retirement tier) (TP 728.)
- Resignations and retirements are forcing mandatory overtime and a **collapse of the staffing model**—increasing denials of vacation requests: less staff = more denials (TP 730-734; *see also* POA Exh. 9)
- Aware of no other police department that limits payment of cash overtime as SJPD does. (TP 741.)

5. David Woolsey Testimony

Woolsey is a Sgt. with the San Jose Police Department, a 12-year veteran and a member of the union board of directors. (TP 382-383.) His key testimony was:

- He has personal knowledge of when a **Police Department will be used as a training ground** by entry-level police officers—he used LAPD to train him before laterally transferring to San Jose. (TP 383-384, 386-391.) He fears that, given the low wages and retirement benefits being offered new officers, they will leave SJPD, as he did LA. (*Id.*)
- When he came to **San Jose it was in the top three or four paying agencies in the Bay Area** and was perceived to be a magnet agency, where employees were paid well and treated well. (*Id.*)
- **Employee pension contributions**—currently around 13%—**will be at least 27.64% by July of 2016**; employee retiree health contributions—currently slated to be 9.5% effective July 1, 2013—could go to 13%, perhaps more (TP 399-403; *see also* 642-646 (Schembri)) for a **total in excess of 40% of salary**.³
- Whereas officer pre-tax take-home pay was approximately \$3600 per pay period in July 2009, if Measure B goes fully into effect and officers receive no pay increases over the next two years, **take-home pay will drop to approximately \$2000 pre-tax per paycheck**. (TP 403-405, POA Exh 8.)
- **Officers have left San Jose primarily because of the reductions in pay** and “the uncertainty that Measure B and the City has put upon the Police Department.” (TP 410.) Officers will continue to leave if the current decimation of take-home pay continues.

³ Schembri acknowledged that the FY 2014 retiree healthcare contribution rate was approximately 27% (Jt. Exh. 29, p. 6) and that Charter section 1512-A(a) mandates a 50/50 share of that between the City and the employee. (POA Exh. 26.)

- With respect to the ability to take vacations, officers bid, by seniority, in cycles of six months; and the **denials of vacation leave are increasing**; new officers, in particular, are unable to **get vacation in blocks of a full week** and are therefore unable to spend time with their families as desired; and “if an officer is denied vacation and not able to use that vacation, they’re constantly accruing, they don’t take anything off, they hit the cap, and ... they’re not getting a benefit that another employee is getting.” (TP 414-20.)

6. The Lawyers: John Tennant and Charles Sakai

Tennant and Sakai negotiated the December extension agreement. They testified about the parties’ different readings of that agreement:

- Tennant explained that the 10% concession was based on a mutual desire of the City and the POA to reduce police officer layoffs (256 originally proposed—66 were laid off).⁴ But the parties could not agree whether the concession would be one time (and therefore automatically sunset) or ongoing, and agreed to arbitrate that issue. (TP 426-31.)
- In the weeks leading up to the December arbitration, the parties agreed—largely due to the POA’s willingness to extend the 10% concession for a second year—to put off the issue of the sunset until the end of fiscal year 2012-13, where it would tie in with negotiations for a new MOA.
- Tennant acknowledged that the POA understood it was giving up **its argument that the concession would sunset automatically**—instead **it would have to persuade the arbitrator that a sunset was justified**. (TP 429.) This was NOT the same as agreeing that the concession was ongoing.
- With respect to the inferences the City tries to draw from the phrase “status quo,” Tennant explained:

“Charles Sakai knows the deal we struck. He knows exactly what we struck. ... “[S]tatus quo” meant the **concession, not that wages were to be held at that level** and that we had to pay some kind of burden to show why the arbitrator was constrained. That is not what that language means. ...

In the context of that e-mail, **it meant that the City was not going to have to face the automatic sunset of the 10% concession. It was to be our burden to show why the comparable labor market justified the restoration of our wage concession; that it would be status quo if**

⁴ The City originally threatened 256 police officer layoffs. The 10% POA concession avoided approximately 150 layoffs. This still left approximately 106 layoffs, which was ultimately reduced to 66 through attrition and credit for unfilled vacancies.

1 we could not show why the relevant labor market and
2 comparables did not justify restoration of the
concession. That was the definition of "status quo." ...

3 Understand that you're talking—it's a difference in
4 terminology. You're talking about a concession, not a set
5 level of wages. **You're talking about a concession,
whether concession is ongoing or not, not whether wage
level remains ongoing. It's a concession.** (TP 426-439.)
6 ...

7 We didn't start out at 10 percent lower. We voluntarily
8 agreed to give up 10 percent as a concession. We
9 understood that the City was not going to agree that the
concession automatically sunset. That's what we agreed
to. Fine. We have to show why we deserve it back. That
was the agreement.

10 **I understood it to mean that we were going to have to**
11 **justify getting our wages back. But what we did not**
12 **understand it to mean – it sounds as if you have some**
13 **argument that the arbitrator is without authority to**
14 **restore the 10 percent, which if that was the City's**
15 **intent to do that, then the City committed fraud,**
16 **because Charles knew perfectly well and so did the**
17 **City.** That would have been a complete capitulation on
18 our part, and that was never what we discussed or
19 intended. (TP 436-439 [emphasis added].)

- 20 • Immediately after being sworn in, Mr. Sakai acknowledged:
21 "I agree with John that they intended to bring *this* back to an
22 Arbitration Panel." [Emphasis added.] **Sakai's use of the**
23 **term "this" is notable because the only issue to be**
24 **brought back to the Panel is the question of the duration**
25 **of the 10% concession, which was originally teed up in**
26 **June 2011,** then punted over in December 2011. That
27 question is distinct from the other before the Panel of what
28 the terms of the new MOA will be, said question not being
brought back but being presented for the first time.
- Sakai then argued that the agreement contemplated that the
restoration of the 10% would also be subject to Section
1111(g)'s restrictions. But that would be to treat the 10%
concession as ongoing and as the new set wage level, a point
Tennant repeatedly rejected because **the sunset would occur**
during the life of the current MOA and, thus, not be
subject to the restrictions of Section 1111(g):

25 "I would disagree that there is some section in 1111 that
26 says that the arbitrator has no authority to restore the 10%.
27 ... [S]omebody has told me that there is something in there
28 that the arbitrator is limited in the authority -- he can give
no more than a 1.24 percent increase or something like
that. That's simply not what was agreed to. ... The
understanding was it was not an ongoing wage level. It

1 was an ongoing ... concession ... that could be restored,
2 not a wage increase that would violate the Charter, but a
3 concession that could be restored in light of the
4 comparables.” (TP 442-443.)

- Mr. Sakai acknowledged “that may be where the two parties disagree. We had this set in our minds as status quo.”

5 **7. External Comparability: Janice Koch v. Jim Bickert**

6 Bickert is a labor representative who works on law enforcement compensation
7 surveys (TP 482-483); Ms. Koch performs a similar function for Mr. Holtzman’s firm.

- Bickert concludes that from a **take-home pay** of senior officers perspective—the metric of most relevance to officers—**SJPD is 21.16% BELOW market**, as compared to a market of Bay Area law enforcement agencies made up largely of agencies to which SJPD is losing officers. (POA Exh. 12 (*compare* to POA Exhs. 18, 20).)
- Koch concludes that from a **cost to the employer** perspective **SJPD is 25% ABOVE market**, as compared to the 10 largest California cities

14 As between Bickert and Koch something has to give: while the cost to the City
15 is undoubtedly an important factor, Section 1111(f) makes that factor an ability to pay
16 factor, not a comparability factor. The criteria of “wages hours and other terms and
17 conditions of employment of other employees performing similar services” in Section
18 1111(e) has always focused on external criteria.

19 The question becomes whether, in a situation where the public safety need to
20 retain officers is both a financial issue and a public safety issue, should the Panel rely
21 more on the cost to the employer or the benefit to the employee? Under the circumstances
22 on evidence in this proceeding, the POA contends it should be the latter. If San Jose
23 genuinely wants to keep its police officers—and Ms. Figone was sincere on the point—
24 does it really care what is the cost to cities of Bakersfield, Fresno, Anaheim, or Long
25 Beach? It should not. San Jose officers are not going to those agencies (*see* POA Exhs.
26 18, 20), and they are not being motivated by *employer* costs. They are leaving because of
27 how uncompetitive SJPD is in take home pay, as compared to neighboring agencies. (TP
28 410 (Woolsey).)

1 **8. Robert Fairlie Testimony**

2 Robert Fairlie is a professor of Economics at UC Santa Cruz. His CV speaks
3 to his extensive experience. His report was on the state of the Bay Area economy, with
4 particular focus on the San Jose metropolitan area. He highlighted:

- 5 • **Overall:** the area, including San Jose, is coming out of the
6 great recession very strongly. “Very consistent
7 [forecasting] of strong economic growth in every concern ...
8 we expect future tax revenues to increase.” (TP 522-525,
9 547.)
- 10 • **Unemployment and Wages:** dropping rapidly, far more so
11 in Santa Clara County than statewide, with even more
12 improvement lately; county employment growth exceeding
13 4% in 2011 and 2012; putting pressure on wages; “wages in
14 Santa Clara are extremely high”; “labor market overall is
15 very healthy, very strong.” (TP 524-527.)
- 16 • **Personal income** is growing rapidly, as is area GDP; “the
17 San Jose/Santa Clara area is the most expensive
18 metropolitan area in the entire U.S.,” the CPI is being
19 subjected to inflationary pressure; personal income growth
20 exceeds 7%; “very, very strong levels of growth” with San
21 Jose exceeding even San Francisco/Oakland. (TP 530-534.)
- 22 • **Gross Domestic Product:** in 2010 San Jose’s growth rate
23 was 13 percent—“to have 13 percent in a metropolitan area
24 [with] minimal population growth is very impressive” ... “to
25 be followed up with a 7 or 8 percent growth rate in 2011
26 is also extremely impressive”; “it’s having kind of a huge
27 economic boom.” (TP 537-539.)
- 28 • **House prices:** The area is a “very, very expensive place to
live”; house prices peaked in 2007, free-fell, then started
climbing again in 2011 through 2012 (see Reilly testimony
and statistics on the same point); prices are getting close to
peak again. (TP 541-543.)
- **Taxable Sales:** gives the potential for sales revenues for the
City; 15% drop in the recession; rebounding beginning in
2010—12%, 2011—10%, “not only rebounded from
recession, but did it very quickly and very strongly in the
last couple of years.” (TP 545.) *See also* Jt. Exh. 33
[\$10.85 million increase in property tax projections].

Dr. Fairlie’s report warrants review in its entirety—even a skim of his graphs
confirms that San Jose is roaring back to economic vitality. Admittedly this fact will not

1 transform the City's financial challenges overnight; however, the likelihood of a dramatic
2 upsurge in revenues cannot be disputed.⁵

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IV
TERM⁶

Police officers deserve some relative sense of stability as they determine whether to stay with SJPd. (TP 653-654 (Schembri).) As Sgt. Robb testified, recent years have seen non-stop concessionary negotiations on wages, pensions, and civilianization. This uncertainty has plagued SJPd. (TP 410 (Woolsey).)⁷

The POA's two-year proposal would offer *some* stability (ideally in tandem with adoption of the POA's wage proposal, below). Further bargaining would be deferred until 2015, when greater financial certainty will exist and pensions may stabilize.

The City's proposed one-year term forces the parties to resume bargaining by January 2014. The cycle of non-stop negotiations, and the financial and relationship costs to *both* sides, would be perpetuated. Notably, during bargaining, the City itself proposed a two-year term. (TP 784 (Robb).)

The City's revised proposal appears to be premised upon budget uncertainties in FY 2014-15. But no city has certainty with its budget. Notwithstanding the City's concerns, four (4) factors should persuade the Panel that the stability of the POA two-year proposal best meets the criteria in section 1111:

- (1) The City Manager's recognition that this is a "stability" budget (i.e., no more cutback/restoring services beyond core services);
- (2) Guerra's testimony that the current City budget could support the POA's proposals;

⁵ Counsel for the City challenged the sufficiency of the public sector focus of the study, but Fairlie confirmed that his study captured both the public and private sectors. Private employment is, in any case, a necessary component in arriving at an award under Section 1111(e). (Panel to consider factors in both "public and private" employment.)

⁶ The POA believes that each side's Term and Wage Proposals should be packaged. Neither side would appear to desire a split decision on those two items.

⁷ Obviously the stability would be relative, since the dramatically negative effect on officers of Measure B's implementation remains undetermined.

- 1 (3) The assurances of significantly increased revenue found in the
2 testimony of Reilly and Fairlie—assessments already coming
3 to fruition (see Jt. Exh. 33 [\$10.85 million more in anticipated
4 FY 13/14 property tax]); and
5
6 (4) The contingencies built into POA proposals #2 and #4 to
7 protect the City should the fiscal situation not improve as
8 predicted in 2014.

9 In sum, a two-year term is warranted.

10 V

11 THE PANEL SHOULD ADOPT THE POA'S WAGE PROPOSAL⁸

12 POA's major arguments about wages are:

- 13 1. A gradual return to 2009 salary levels is justified, in the
14 public interest, and permissible under Section 1111 because
15 it is a sunset, NOT a wage increase.
16 2. Officer take home pay, measured against the cost of living, is
17 dramatically worse than in 2009. (POA Exh. 8.)
18 3. The level of pay has been the major factor forcing officers to
19 leave because, in the words of the City Manager, San Jose is
20 simply "not competitive."
21 4. The City can currently afford the POA's proposal, and its
22 financial outlook has already stabilized, continues to
23 improve, and can, with confidence, be projected to further
24 improve, perhaps dramatically.

25 A. **Threshold Issue: The parties ALWAYS intended that the Panel**
26 **would have the jurisdiction and the ability to SUNSET the POA**
27 **concession UNDER THE CURRENT MOA.**

28 The single most critical issue in this arbitration is whether the 10% concession
should sunset. The issue was originally created in June 2011, when the parties punted on
the issue of duration. (Jt. Exh. 18.) They did so, however, specifically setting the issue of
whether the concession would sunset for arbitration by a panel like this. The key point is
that the parties, at that time, indisputably intended that the concession *could* sunset—in its
entirety, on a date certain—if the POA prevailed in that arbitration. (Because it is
doubtful that the Section 1111(g) average revenue figures would have been much

⁸ See footnote 5.

1 improved back then, the City, by its proposed application of Section 1111(g) to this issue,
2 is basically arguing that the POA could not achieve a sunset from the inception of the
3 agreement in June 2011, and that the provision was largely, if not totally, illusory.)

4 Since then, the parties agreed to continue the concession for a second year.
5 But here the parties' views diverge: To the POA, the December 7, 2011 Agreement (Jt.
6 Exh. 19) (1) kept the concession in place for another year—"the 10% wage reduction shall
7 remain the 'status quo'" (POA Exh. 16; TP 436:14-18, 439:11-15 (Tennant)), but (2)
8 retained the question of the sunset of the 10% for determination through arbitration *by*
9 *May 31, 2013*—i.e., construing and applying the December 7, 2011 addendum to the
10 current MOA (not subject to the limitations of Section 1111(g)), albeit within the same
11 proceeding as would decide the successor MOA (which is subject to Section 1111(g)).

12 Nothing in the December 7, 2011 Agreement made the sunset of the
13 concession any less achievable in May 2013 than it would have been had the arbitration
14 taken place in June 2011—except, as Tennant acknowledged, the POA would now carry
15 the burden of persuading the arbitrator that a sunset was justified, as opposed to it simply
16 occurring on a certain date. (TP 429:5-15, 437:1-9.) Moreover, just as with the June 3,
17 2011 Agreement, nothing was intended to make a sunset "beyond the law," be it Section
18 1111(g) or anything else: "It was an ... ongoing concession that could ... be restored, not
19 a wage increase that would violate the Charter." (TP 443:10-13 (Tennant).)

20 The City takes the view that the December 7, 2011 Agreement not only
21 extended the concession for a second year, but also constituted an outright capitulation by
22 the POA on the sunset of the 10%. Tennant made clear throughout his testimony that
23 there had been no capitulation.

24 There are at least 4 problems with the City interpretation.

- 25 (1) The practical application of the City's position is to allow the City
26 to achieve through a disputed reading of the December 7, 2011
27 Agreement what it could not achieve at the bargaining table—that
28 is, making the 10% concession ongoing. In other words, accepting
the City interpretation places the POA in no different a position
than if the concession had been ongoing.

- 1 (2) Accepting the City's interpretation begs the question of what
2 consideration the POA received for the December 7, 2011
3 Agreement? As Tennant explained, "a lot of thought and effort ...
4 went into making this **an agreement that both sides could live**
5 **with.**" (TP 433:15-17.) The City wanted no automatic sunset—it
6 got that. The POA was fine with a second year of -10%, but
7 wanted the opportunity to arbitrate the sunset **under the current**
8 **MOA** (assuming the issue was not resolved in bargaining) before
9 July 1, 2013 (the effective date of the successor MOA)—hence the
10 May 31, 2013 original deadline.⁹ See also POA Exh. 16 ["58%
11 voted in favor of **continuing the 10% giveback for another**
12 **year**"] [emphasis added].
- 13 (3) The December 7, 2011 Agreement is dramatically different in
14 terms and scope than "ongoing" wage concession agreements the
15 City negotiated with other units—*compare* Jt. Exh. 19 *with* POA
16 Exhs. 11, 12. If the POA was simply mirroring the other unions'
17 10% ongoing concession, why did the extension agreement need
18 so many extra clauses, *status quos*, and the like?
- 19 (4) The City appears to misunderstand the purpose of the *status quo*
20 reference in the December 7, 2011 Agreement. *Compare* Sakai:
21 "We had this set in our minds as status quo" (TP 443:16-17) *with*
22 Tennant: "[S]tatus quo' meant the concession, not that wages
23 were to be held at that level" (TP 436:14-16) ... "Understand that
24 you're talking – it's a difference in terminology. You're talking
25 about a concession, not a set level of wages. You're talking about
26 a concession, whether a concession is ongoing or not, not whether
27 wage level remains ongoing. It's a concession." (TP 439:10-15.)

28 Whereas there is confusion on the City side about the sunset, there is adamant
conviction on the POA side that the sunset of the 10% was to be presented to this Panel.
It would be unfortunate if the POA's collaborative gesture of extending the concession a
second year to help the City is recast as an outright capitulation on the issue that it fought
so clearly to preserve for two years.

Accordingly, the Panel should determine that the parties agreed to a two-year
concession of 10%, but also preserved the question of the appropriateness of the sunset.

B. The Wage Concession SHOULD sunset.

Having determined that the parties' preserved the question of whether a
sunset is appropriate, the Panel should rule affirmatively that the 10% concession
should sunset.

⁹ Had there been no deadline for arbitration, the City, by dragging its heels in bargaining
well into FY 13/14, effectively could have made the concession "ongoing."

1 The 10% concession was originally intended to prevent the layoff of 256
2 officers. All but 66 layoffs were averted.¹⁰ Yet, in what was perhaps a cruel irony, the
3 means of avoiding the layoffs to some degree backfired and fueled the resignation of 150
4 veteran officers.¹¹ So the 10% concession—which the City seeks to maintain—is now
5 preventing the retention officers at a time when SJPd desperately seeks to add, not shed,
6 officers. The City has survived the worst of the great recession; its budget has stabilized;
7 it is realizing rapidly increasing revenues—see Jt. Exh. 33 (\$10.85 million in anticipated
8 additional property taxes). The 10% concession should therefore sunset. If it does not,
9 even more officers will leave (see POA Exh. 17 [SJPd survey])—\$170,000 of training
10 costs and untold expertise departing, each time.

11 San Jose's non-competitiveness in wages and new employee retirement
12 benefits means it will not, in the medium to longer term, be able attract officers with
13 greater education or individuals with a diversity of cultural and racial backgrounds.¹²
14 More immediately, it will not be able to retain its current officers. Philosophically, it has
15 to be in the public interest to get better-educated police and those with a greater skill set to
16 work in the largest city of the Sunnyvale-San Jose-Santa Clara metropolitan area.

17 For those who stay, if the concession does not end and the City's 0%, one-year
18 term proposals are adopted, officers, who already pay 22%+ for combined (pension +
19 retiree healthcare) retirement costs, will pay: an additional 1.75% in normal cost increase
20 July 1, 2013; a 4% Measure B increase January 1, 2014; and a further 4% July 1, 2014.

21 **So, under the City's proposals, come July 1, 2014, officers will see themselves not**

22
23 ¹⁰ See footnote 4. Additionally, within a couple of months, all of the laid off officers were
24 offered reemployment, but more than half, many of whom had found employment with
other departments, declined. (TP 720 (Robb).)

25 ¹¹ The least senior officers would have been laid off whereas it has often been more senior
26 officers, with vast knowledge of policing in San Jose, community relationships, and the
27 like, who have resigned because of the pay reductions.

28 ¹² An important clarification that the Arbitrator made was that the City has not hired
actual lateral officers from other departments, but has hired officers who have completed
an academy but have no street experience. (TP 704-05 (Flaherty/Schembri).)

1 merely 10% below 2009 levels but 20% below: akin to something like 2001 levels.

2 CPI has risen consistently in the meantime. (TP 403-405 (Woolsey); POA Exh. 8.)

3 The initial benefit to the City—\$46 million in savings at the height of the worst
4 of the great recession—is no longer necessary (see Reilly and Fairlie testimony). And its
5 benefits are arguably outweighed by the costs of attrition¹³ and increased overtime.

6 As the testimony of Figone, Guerra, Reilly and Fairlie and the financial data
7 establish, the City can afford the restoration of the concession—particularly in the modest,
8 staggered manner proposed by the POA. The public interest demands some effort to
9 buttress a collapsing public safety model. We have seen the loss of the mantle of
10 “America’s safest big city”; a 30% drop in sworn officers; elimination of the Gang Task
11 Force; a crime and murder spree in 2012 carrying over into 2013; 150 police officer
12 resignations over 24 months (the norm is about six per year; the resignations do not
13 include retirements); the \$25 million in hiring and training costs that walk out with those
14 officers; and the frank admission by the City Manager that San Jose is simply “not
15 competitive in attracting or retaining police officers.”

16 Retaining the concession will do NOTHING to stop the bleeding. Moreover,
17 the modesty of the POA’s proposal will hardly turn things around overnight or even over
18 two years. But financially and psychologically, the sense that the ship may be turning
19 around, or at least no longer taking on water, may persuade some officers who would
20 otherwise leave to stay and give the City more time.

21 Accordingly, the concession should sunset, but in the manner proposed in POA
22 proposal #2.

23 **C. Beyond the Sunset that would merely restore the 2009 salary rate**
24 **under the current MOU, the POA seeks no pay increases under the**
successor MOU.

25 To clarify, beyond a sunset of the concession under the current MOA, the POA
26 seeks no salary increase beyond the June 2009 level that would be restored. This

27
28 ¹³ Again, the replacement costs for every officer who leaves is \$170,000.

1 approach eliminates the need for application of the section 1111(g) to POA proposal #2,
2 although not to POA proposals #3-#8.

3 VI

4 THE PANEL SHOULD SELECT POA PROPOSAL #3

5 The POA proposes to suspend the current vacation cap effective July 1,
6 2013—subject to reopener once the police department reaches 1250 sworn. It is a
7 reasonable proposal, reflecting the increasing inability of officers to secure vacation time.
8 (TP 730-734 (Robb), 414-420 (Woolsey), POA Exh. 9.) Vacation leave is deferred
9 compensation. (*Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774, 779.) Notably, the
10 vacation cap has only existed since 2008-09, when the number of officers exceeded 1400.
11 (TP 669 (Schembri).)

12 As officers numbers decline—and the best case scenario (JT. Exh. 28), which
13 the POA heavily disputes¹⁴, is that staffing can return to 1109 by Fall of 2014—
14 supervisors will be less able to grant vacation without creating the necessity for overtime,
15 a Hobson's Choice of sorts in these economic times. (TP 730-734 (Robb), TP 414-420
16 (Woolsey), and POA Exh. 9.) The City disputes the need for the cap to be lifted, since
17 only 20 out of 1084 officers are capped (TP 678 (Schembri, reviewing her presentation)),
18 but, if so, then this would be a relatively minimal “give” to the POA. The reality, of
19 course, is the City numbers do not show those employees who, given the current staffing
20 challenges, will reach the cap and thereby lose agreed-upon deferred compensation.

21 There is no cost to the City resulting from this item as it does not constitute an
22 increase over previously agreed terms.

23 VII

24 THE PANEL SHOULD SELECT POA PROPOSAL #4

25 The POA Leave Balance Buydown proposal is to permit an annual 80-hour
26 cash out (using Compensatory Time Off and/or Vacation) based on the same model as
27

28 ¹⁴ See TP 695-701, Unland/Schembri colloquy.

1 three other City unions who have it. In order to address the City's fiscal concerns in
2 Fiscal Year 2014-15, the POA proposal provides for a suspension of the Leave Balance
3 Buyout if revenue figures do NOT exceed the City Manager's projections by about 1.75%
4 (or approximately \$ 7.5 million).¹⁵

5 The Leave Balance Buydown was one of the few items of near-agreement
6 between the parties at the table. It is not clear what the City's justification for completely
7 withdrawing the proposal is.

8 In terms of cost, it is not a question of increasing costs—under federal and
9 state law accrued CTO and vacation credits must be paid out—but of when the credits are
10 paid out. As Ms. Schembri conceded, under the law, were an employee to separate City
11 service, he/she would be entitled to full payout of vacation and CTO hours. (TP 658.)
12 Under the POA approach, a limited amount of credits would be available to be cashed out.
13 This permits the employee to access extra cash at a time when their wages are well below
14 market (their own money, to be sure), is one time money and reduces the future financial
15 obligations of the employer (also paying down at current, not future rates—*see* City
16 Proposal to freeze sick leave hourly rate).

17 VIII

18 THE PANEL SHOULD SELECT POA PROPOSAL #5

19 The Panel should select the POA's Overtime/Compensatory Time Off
20 proposal. The concept is that when an employee works overtime he/she will have an
21 unlimited ability to choose cash payment or CTO.

22 The Panel's hands on this issue are largely tied because the City's proposal
23 would violate the Fair Labor Standards Act ("FLSA"). Under the federal FLSA, an

24 ¹⁵ The full contingency is: Fiscal Year 2014-15 Only: if the anticipated increases in City
25 revenues from sales tax and property tax at the time of the May 2014 City Manager's
26 Proposed Operating Budget do not, combined, exceed the levels predicted in the City
27 Manager's February 28, 2013 Budget Request by 1.75%, the annual 80-hour cash out
28 shall be suspended during Fiscal Year 2014-15, but shall resume effective July 1, 2015
unless otherwise agreed to by the parties or changed pursuant to Charter Section 1111.
This contingency shall be voided if, before July 1, 2014, the City prevails in its litigation
with the County of Santa Clara over funds of the former Redevelopment Agency.

1 employer is normally required to compensate employees at one-and-one-half times their
2 regular hourly rate of pay when they work additional hours beyond their legal straight-
3 time hourly threshold. (See 29 U.S.C. § 207 [known as “Section 7” of the FLSA].) The
4 FLSA only permits an employer to provide compensatory time off¹⁶ in lieu of premium
5 overtime wages under a very narrow set of circumstances. In regard to union-represented
6 employees, “[a] public agency may provide compensatory time ... only ... pursuant to ...
7 applicable provisions of a collective bargaining agreement, memorandum of
8 understanding, or any other agreement between the public agency and representatives of
9 such employees” (29 U.S.C. § 207(o)(2) [emphasis added].)

10 Thus, the *sine qua non* of compensatory time off is an agreement by the
11 impacted employees’ bargaining representative. Because the POA does not agree to the
12 City’s proposal, particularly the provision mandating the use of compensatory time off
13 when cash overtime is not budgeted-for¹⁷, the City’s proposal is unlawful and must be
14 rejected by the Panel.

15 IX

16 THE PANEL SHOULD SELECT POA PROPOSAL #6

17 The Panel should retain the current provision governing Eligibility For
18 Premium Pays During Paid Leave. The City offered little if any justification for why it
19 needed to eliminate this benefit which is only received by officers in specialty

21 ¹⁶ “Compensatory time off is paid time off the job which is earned and accrued by an
22 employee in lieu of immediate cash payment for employment in excess of the statutory
23 hours for which overtime compensation is required by section 7 of the FLSA.” (29 C.F.R.
24 § 553.22(a).) “The Act requires that compensatory time under section 7(o) be earned at a
rate not less than one and one-half hours for each hour of employment for which overtime
compensation is required by section 7 of the FLSA.” (29 C.F.R. § 553.22(b).)

25 ¹⁷ The suggestion that the City cannot be required to pay overtime wages when they have
26 not been budgeted is false. In *White v. Davis* (2003) 30 Cal.4th 528, 578, the California
27 Supreme Court held that, “in order to comply with the FLSA, the state, during a budget
28 impasse, ... must timely pay nonexempt employees who work overtime their full salary
for all straight time worked plus one and one-half times their regular rate of pay for
overtime.” This was true even though the State, unlike the City of San Jose, is normally
prohibited under the California Constitution from making payments absent an
appropriation. (See *id.* discussing Cal. Const., art. XVI, § 7.)

1 assignments (e.g., bomb squad, SWAT, motorcycles). (TP 702.) The proposal seems
2 unduly harsh, at a time when the City has decimated disability rights for police officers,
3 who are among the most susceptible City employees to being disabled—or worse—on the
4 job. (POA Exh. 26, Measure B § 1509-A [radically reducing disability benefits for
5 employees].)

6 Recent examples show the problem that application of the City proposal would
7 create. Two more recent line-of-duty deaths in San Jose (1988 and 1999) involved
8 officers in specialized assignments, who receive this premium. More recently, a motor
9 officer (who ultimately was forced to retire) was off for extended periods of time after
10 being struck by a vehicle and suffering a broken neck. And a MERGE officer who was
11 shot during a hostage/barricade incident was also on disability for a significant length of
12 time. Both of these officers would lose their premium under the City proposal.

13 **X**

14 **THE PANEL SHOULD SELECT POA PROPOSALS #7 AND #8**
15 **REGARDING SICK LEAVE PAYOUT AND FUTURE SICK LEAVE**

16 Currently, upon retirement, termination or death, an employee is entitled to
17 payout on his/her sick leave balances according to certain formulas in the MOA. For
18 example, once an employee reaches 1200 hours of accrued sick leave, he/she is entitled to
19 payout of all hours at current hourly rate. Right now, as employees continue to earn sick
20 leave credits, they are entitled to this admittedly generous formula. This benefit has
21 existed for decades (TP 685)—but the POA is committed to scaling it back significantly.
22 Accordingly, the POA agrees with the City that sick leave balances would be “frozen,”
23 effective June 30, 2013. This means that the maximum number of hours subject to the
24 payout will be those accrued by June 30, 2013. No additional hours will be accrued for
25 that benefit. Because both sides agree on this point it should be part of the next MOA.

26 The parties also agree that when an employee uses sick leave after July 1,
27 2013, it will be on a “last-in-first-out” model. That is, an employee will only be required
28 to use *pre*-July 1, 2013 sick leave credits (the hours subject to payout) when he/she has

1 exhausted his/her *post*-July 1, 2013 sick leave credits (there will be two sets of sick leave
2 hours kept). This, too, should be part of the MOA.

3 The parties disagree over two issues: First, should the hourly rate applicable to
4 sick leave credits subject to the payout upon separation be “frozen” at June 30, 2013 rates
5 of pay? Second, should “new” sick leave hours earned after July 1, 2013 have any value
6 other than through usage by an employee calling-in sick?

7 **The hourly rate should NOT be frozen.** The POA has made a significant
8 concession from a benefit that existed for decades. Ending the sick leave payout model in
9 its current form largely cuts off any increase in the future for the City. Ms. Schembri
10 acknowledged that some form of sick leave payout is common in other jurisdictions. (TP
11 671-673.) Freezing the payout rate at June 30, 2013 level (which appears to be the City
12 proposal) would unfairly further punish the POA for its 10% concession in 2011.

13 **“New” sick leave hours should have some value other than through usage.**
14 Given the current staffing model—where any sick leave call-in stretches coverage to the
15 breaking point—it is reckless not to try to incentivize not calling in sick. (TP 734-736
16 (Robb)—and see increasing sick leave usage at POA Exh. 22.) The City’s arguments are
17 counter-intuitive: on one hand, retention and recruitment are “very important” to it; on the
18 other, notwithstanding that other jurisdictions have some form of *prospective* sick leave
19 payout, it proposes nothing. (TP 693-694 (Schembri).)

20 POA Vice-President John Robb summed it up best:

21 Unland: Under the current staffing model with the San Jose PD,
22 do you think future sick time should have some type of
23 value? Maybe not the 100 percent value it has now, but
some type of value going forward.

24 Robb: Yes.

25 Unland: Why is that?

26 Robb: Put simply, I don't want officers calling in sick unless
27 they're absolutely incapable of doing the job. We do not
28 have the staffing. Our teams in patrol are going out with
four. We are so far below staffing, it's a safety issue
right now. (TP 784.)

1 The POA has proposed what it terms “the San Francisco model”—because San
2 Francisco POA’s memorandum of understanding has it. The main criteria are that if an
3 employee (1) maintains a core bank of 300 hours of accrued sick leave but (2) in any
4 single year uses fewer than 30 sick leave hours (or three shifts (employees received 96
5 hours per year of sick leave)), then (3) he/she may cash out up to 50 hours once per year.
6 This is a reasonable way to reward employees who do not call in sick, without creating the
7 large payout banks of the past.

8 The City presented no basis for treating new employees any differently than
9 existing employees with respect to post-July 1, 2013 sick leave accruals. New police
10 officers, who will likely be replacing more defections of existing police officers, will
11 become equally important to the staffing model. They, too, must be encouraged not to use
12 sick leave unnecessarily.

13
14 Dated: June 5, 2013

15 CARROLL, BURDICK & McDONOUGH LLP

16
17 By _____

18 Gregg McLean Adam
19 Jonathan Yank
20 Attorneys for San Jose Police Officers’
21 Association
22
23
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27
28

1 *San Jose POA and City of San Jose Interest Arbitration for Successor MOA*
2 JAMS # 1110015552

3 **PROOF OF ELECTRONIC SERVICE**

4 I declare that I am employed in the County of San Francisco, California. I am
5 over the age of eighteen years and not a party to the within cause; my business address is
6 44 Montgomery Street, Suite 400, San Francisco, CA 94104. On June 5, 2013, I served
7 the enclosed:

8 **SAN JOSE POLICE OFFICERS' ASSOCIATION'S**
9 **INTEREST ARBITRATION BRIEF; and**

10 **JOINT EXHIBIT #33**

11 by electronic service. Based upon agreement of the parties to accept service by electronic
12 transmission, I caused the documents to be sent to the persons at the electronic
13 notification addresses listed below. I did not receive, within a reasonable time after the
14 transmission, any electronic message or other indication that the transmission was
15 unsuccessful.

16 Hon. John A. Flaherty (Ret.)
17 Email: jflaherty@jamsadr.com
18 kreplogle@jamsadr.com

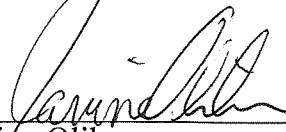
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Renne Sloan Holtzman Sakai LLP
350 Sansome St., Ste. 300
San Francisco, CA 94104

1 I declare under penalty of perjury that the foregoing is true and correct, and
2 that this declaration was executed on June 5, 2013, at San Francisco, California.

3 
4 Janine Olikar